IN THE
SUPREME COURT OF THE STATE OF MICHIGAN

On Appeal From The Michigan Court Of Appeals
Borello, P.J., and White and Smolenski, J.J.

MILISSA MCCLEMENTS,

Plaintiff-Appellee/Cross-Appellant,

vs.

FORD MOTOR COMPANY

Defendant-Appellant/Cross-Appellee.

Supreme Court No. 126276

Court of Appeals No. 243764

Oakland County Circuit Court
No. 01-034444-CL
Hon. Wendy L. Potts

REPLY BRIEF OF APPELLANT FORD MOTOR COMPANY
PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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I. Plaintiff Seeks To Eviscerate The Concept Of Duty.

Plaintiff demonstrates beyond a doubt that her intent is to expand Hersh v Kentfield Builders Inc, 385 Mich 410; 189 NW2d 286 (1971), beyond the boundaries of negligent retention and, indeed, beyond the boundaries of hornbook rules of negligence. According to Plaintiff, she need not worry about "scope of duty." The only question, according to Plaintiff, is whether "there is evidence of a breach." (Plaintiff's Response Brief at 3). Plaintiff's position is "misbegotten." MacDonald v PKT Inc, 464 Mich 322, 335; 628 NW2d 33 (2001). Although Plaintiff makes no attempt to analyze the issue of duty as required by this Court's precedents, it is an elementary principle that there can be no breach unless there is a duty. Further, because one of the policies underlying imposition of a duty is that of preventing future harm, it is imperative that the scope of that duty be ascertainable before the harm, rather than imposed in hindsight through ad hoc jury determinations. Williams v Cunningham Drug Stores Inc, 429 Mich 495, 502-503; 418 NW2d 381 (1988). Plaintiff never forthrightly admits it, but her analysis inevitably dictates that an employer must terminate all first-time misdemeanor offenders in order to protect against potentially limitless liability. Where, as here, "overriding public policy concerns" are at stake, the question of reasonable care is for the Court to decide as a matter of law. Id, 429 Mich at 500-501.

The cases Ford cited in its principal brief with respect to duty are not anomalies, as Plaintiff implies. Rather, they stand for the cardinal principle in negligent retention cases that the scope of an employer's duty "is limited to foreseeable victims, and then only 'to prevent the tasks, premises, or instrumentalities entrusted to the employee from endangering others.'" Crisman v Pierce County Fire Protection Dist No 21, 115 Wash App 16, 20; 60 P3d 652 (2002). The facts of Hersh do not support recognition of a

broader duty, nor does any other case cited by Plaintiff.

For example, in Gregor v Kleiser, 111 Ill App 3d 333; 443 NE2d 1162 (1982), the employee, Charles Pape, was retained as a "bouncer" for a private party; while on the defendant's premises (where the party was in progress), Mr. Pape assaulted and seriously injured the plaintiff, a party guest. 111 Ill App 3d at 335-336. Similarly, in Moses v Diocese of Colorado, 863 P2d 310 (Colo 1993), an assistant priest counseled a parishioner as one of his job duties; during those counseling sessions, he engaged in sexual relations with the parishioner. Id at 316, 328. In Ponticas v KMS Investments, 331 NW2d 907 (Minn 1983), the employee was an apartment manager who entered one of the apartments he was hired to manage with the pass-key entrusted to him by his employer; once inside, he raped the tenant. Id at 913.

Plaintiff does not claim Mr. Bennett injured her with an air gun or beeper or any other "instrumentality" Ford might have entrusted to him to do his job. Nor can Plaintiff claim Mr. Bennett kissed her while performing a "task" assigned to him by Ford, or even on "premises" entrusted to him by Ford. Nothing about Mr. Bennett's assigned "tasks" required him to enter even AVI's public areas at any time. He could take his coffee breaks where he pleased – in the cafeterias, in a separate salaried employee cafeteria, or at any nearby restaurant. Indeed, he did not have to take a break at all.

Mr. Bennett did not kiss Plaintiff because of any "task, premises, or instrumentalities" entrusted to him by Ford. Rather, he was trespassing on premises controlled by another, Plaintiff's employer AVI. As Plaintiff testified, she generally would not have even been alone in the AVI kitchen or stockroom where Mr. Bennett allegedly found her. However, AVI had not replaced the cashier who had been working with

Plaintiff, and had sent the cook normally assigned to work with Plaintiff to assist in another cafeteria between breaks, staffing decisions controlled by AVI. (Appeal Apx 0409a-0412a). It was this control by another, and Mr. Bennett's act of trespass onto this property controlled by another, that took Plaintiff out of the zone of risk and outside the scope of any arguable duty.[1]

In the end, Plaintiff's position is even less compelling than that presented in Carter v Skokie Valley Detective Agency Ltd, 256 Ill App 3d 77; 628 NE2d 602 (1993). Plaintiff's argument at its essence is that because Mr. Bennett met Plaintiff in the AVI cafeteria where she worked, and because the cafeteria was co-located on the premises of the Wixom Plant where Mr. Bennett worked, Ford must be liable for anything that allegedly transpired between the two of them from that point forward. Even if Ford somehow incidentally "furnished the condition" that introduced the two, the nexus is too attenuated to impose liability for negligent retention as a matter of law. Carter, 256 Ill App 3d at 82-83.

II. There Is No Public Policy Justification For Expanding Hersh.

Plaintiff argues that Hersh, a case involving an employee convicted of two violent

[1] Plaintiff now speculates Ford might have had some joint control over access to the AVI cafeteria because "Ford employees often used that [AVI] door to go into the cafeteria at times when it was closed." (Plaintiff's Response Brief at 21). Plaintiff's November 2001 testimony cited for this proposition clearly provides that this was a "recent" problem that began in mid-2001 (not in 1998). Plaintiff assumed the individuals involved were Ford hourly workers, but did not know who, in fact, they were. Whoever they were, she was working with AVI management to correct the problem. (Appeal Apx 184a-185a). There is no evidence Ford knew of this problem (other than through Plaintiff's deposition). Plaintiff's situation thus differs in all relevant respects from DiCosala v Kay, 91 NJ 159; 450 A2d 508 (1982), where the employer was found negligent for knowingly permitting its employee to maintain a dangerous condition – a loaded gun in plain view – on the employer's premises, with knowledge that others, including minors, frequently accessed the premises. 91 NJ at 178.

felonies, requires a jury to evaluate public policy considerations such as rehabilitation versus unemployability of first-time misdemeanor offenders. Plaintiff justifies this incredible leap in logic by asserting that "the Elliott-Larsen Act allows Ford to deny employment to those convicted of crimes." (Plaintiff's Response Brief at 13). If Elliott-Larsen required Ford or any other employer to deny employment to those convicted of misdemeanor offenses, perhaps Plaintiff might pose an argument that such a statutory provision evinced a public policy against rehabilitation and in favor of unemployability of misdemeanor offenders. But no provision of Elliott-Larsen (or any other statute) evinces such a counter-productive public policy.[2]

Plaintiff's alternative argument for submitting such a compelling public policy concern to a jury is that, while Mr. Bennett might be suited for some Ford employment despite his misdemeanor conviction, he was not suited for employment as a superintendent. According to Plaintiff, Mr. Bennett, "as a superintendent, had the power and opportunity to abuse women in isolated areas of a large plant at all hours of the night." (Plaintiff's Response Brief at 14). Also according to Plaintiff, Mr. Bennett allegedly used this "power" to lure Ms. Maldonado (a Ford employee then in Mr. Bennett's department) to an "isolated area" by giving her "a routine work direction." (Plaintiff's Cross-Appeal Brief at 8).

Plaintiff's argument is a non sequitur with respect to Plaintiff. It demonstrates nothing more than to once again reveal that the driving force behind this litigation is the

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[2] Plaintiff cites to "MCL 37.2205" in support of this proposition. Presumably, Plaintiff is referring to MCL 37.2205a; MSA 3.548(205a), which prohibits employers, unions and employment agencies from requesting, making or maintaining "a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result." The fact that Ford could have created a record of Mr. Bennett's conviction (at least prior to the expungement) in no way mandated that Ford fire him because of it.

claim of Justine Maldonado. To repeat, Mr. Bennett, by virtue of his job as a Ford superintendent, had no "power or opportunity" to enter an AVI stockroom. He was precisely in the same situation vis-à-vis AVI premises as any hourly employee, any friend or relative visiting the Wixom Plant, any commercial messenger hired by a vendor to deliver materials to the Wixom Plant, or indeed any trespasser inside the plant gates. Any of these individuals had just as much access and would have been just as guilty of trespassing as Mr. Bennett allegedly was.

Nor would there be any expectation that Plaintiff would meet Mr. Bennett in any "isolated area" of Ford's facility. Plaintiff's job with AVI gave her access only to the AVI premises. To the extent she was an invitee of Ford, her presence on premises under Ford's control was limited to entering and exiting the Wixom Plant through populated areas. Restatement 2d Torts § 332 (1965), comment l. If Plaintiff had strayed outside her "area of invitation," to remote or isolated areas under Ford's control (something she does not claim), she would have forfeited her invitee status. See Shears v Pardonnet, 80 Mich App 358, 362; 263 NW2d 373 (1977) (following another provision under Restatement's comment l to conclude invitee who exceeded scope of invitation could be considered a trespasser). Cf Stitt v Holland Abundant Life Fellowship, 462 Mich 591, 607; 614 NW2d 88 (2000) (declining to adopt "public invitee" definition of Restatement § 332(2), but not addressing provisions applicable here).

III. Ford's Criticism Of Plaintiff's Equivocation Is Not A "New Claim."

Plaintiff's testimony regarding the timing of Mr. Bennett's interactions with her cannot be characterized as anything other than speculative, equivocal and inconsistent. The only certainty in her testimony was that the interactions, including the alleged invitations to meet after work and the kiss and attempted kiss, all occurred in a three to

four-week period (Appeal Apx 199a).

Plaintiff now accuses Ford of attempting to "mislead" this Court by misrepresenting Plaintiff's Complaint. According to Plaintiff, all she said in her Complaint was that "Bennett starting talking to her in September 1998." (Plaintiff's Response Brief at 9, emphasis by Plaintiff). That is untrue. Plaintiff testified that all of the offending events involving Mr. Bennett – the three alleged invitations to meet and the alleged kissing incidents – occurred in the three-to-four-week timeframe (Appeal Apx 199a), and said in paragraph 20 of her Complaint that the alleged invitations began in September 1998; i.e., that the three-to-four week period started to run in September 1998:

> Commencing in September 1998, when the defendant Bennett saw the plaintiff McClements in a cafeteria at the Wixom plant, he repeatedly and insistently asked her to go out with him, meet him after work, and made numerous similar requests, all of which she refused.

(Appeal Apx 56a) (emphasis added). Plaintiff carefully read her Complaint during her deposition and swore it was accurate. (Appeal Apx 208a).[3]

Plaintiff's efforts to add certainty to her equivocation are disingenuous. Plaintiff did not testify she moved to Café 2 in "early fall"; rather her testimony was it was "possibly early fall." (Appeal Apx 166a) (emphasis added). Her testimony that she moved out of Café 2 "just prior" to February 1, 1999, "around the holiday," was "purely a guess." (Appeal Apx 167a). With respect to other attempts to establish a chronology of

[3] That Plaintiff indeed thoroughly read through her Complaint, and particularly her allegations of what Mr. Bennett allegedly did, before swearing to the accuracy of the allegations is confirmed by her correcting the allegation in paragraph 23 to clarify that she was uncertain Mr. Bennett succeeded in kissing her the second time. (Appeal Apx 208a).

events, Plaintiff admitted she was "guessing to the best of [her] knowledge." (Appeal Apx 193a).

As Plaintiff concedes, however, even reading all of her testimony as consistent and certain, there was less than a month between the time of Ms. Maldonado's alleged hearsay "complaints" and the alleged kiss and attempted kiss (Plaintiff's Cross-Appeal Brief at 27), meaning these incidents were virtually simultaneous.

Plaintiff attempts to respond to Ford's criticism of her inconsistencies and uncertainty by characterizing it as a "new claim" by Ford. (Plaintiff's Response Brief at 3). Plaintiff knows such is not the case. Ford argued to the trial court in writing and at oral argument (at which time Plaintiff's counsel admitted Plaintiff's testimony on the issue was inconsistent) (Appeal Apx 321a-322a, 353a, 362a-363a), and in its application to this Court, that equivocal testimony with respect to a predicate fact cannot defeat summary disposition. When exactly Mr. Bennett allegedly kissed Plaintiff is not an issue of credibility. If Plaintiff cannot establish it was after Ms. Maldonado's alleged "complaints," Ms. Maldonado's "complaints" cannot possibly be notice. Mason v Wal-Mart Stores Inc, 91 SW3d 738, 743-744 (Mo App 2002). Plaintiff's equivocation and inconsistent testimony on this predicate fact is conjecture because it supports "2 or more plausible explanations," Skinner v Square D Co, 445 Mich 153, 164; 516 NW2d 475 (1994), i.e., that the alleged events occurred either before or after Ms. Maldonado purportedly "complained." That the trial court did not rule on the basis of this argument did not render it a "new claim." (Appeal Apx 15a-16a).

IV. Plaintiff's Claim Is For Negligent Retention, Not Supervision.

What is a "new claim" is Plaintiff's assertion, in a footnote and for the first time in this case, that she is also asserting a claim for "negligent supervision." (Plaintiff's

Response Brief at 11 n3). Plaintiff has never argued that Ford negligently supervised Mr. Bennett. Rather, her claim has always been Ford had a duty not to retain – i.e., a duty to discharge – Mr. Bennett. As Plaintiff asserts, "if Ford had taken appropriate action, Bennett would not have been on the Wixom grounds so that he could gain access to the cafeteria." (Plaintiff's Response Brief at 21). The Court of Appeals ruled, "We therefore reverse the decision of the trial court and reinstate plaintiff's claim of common-law negligent retention." (Appeal Apx 20a) (emphasis added). That is the ruling that is before this Court on Ford's appeal.

V. Plaintiff's Arguments Are Counter To Legislative Policy And Court Precedent.

Plaintiff's remaining arguments are revealing of Plaintiff's desire to change – not follow – the law of Michigan. Plaintiff complains that the duty Ford owed was that of preventing Mr. Bennett from "sexually harassing women at the Wixom Plant." (Appeal Apx 395a). An employer's duty with respect to sexual harassment arises solely under Elliott-Larsen. With respect to hostile environment sexual harassment, which is what Plaintiff claims happened to her, the employer's duty arises after it receives notice that the plaintiff is being harassed. Chambers v Trettco Inc, 463 Mich 297, 312-313; 614 NW2d 910 (2000).

The cases cited by Plaintiff do not dictate a different result, in that they deal with the question of whether the plaintiff could bring a sexual harassment suit against her employer and sue the alleged harasser for a common law tort. See Kibbe v Potter, 196 F Supp 2d 48 (D Mass, 2002) (analyzing plaintiff's Title VII claims against employer and emotional distress and assault claims against co-worker).[4] Another case cited by

[4] Most of Plaintiff's cases involve federal employee claims under Title VII. Only one

Plaintiff, Maksimovic v Tsogalis, 177 Ill2d 511; 687 NE2d 21 (1997) crystallizes the distinction. In Makismovic, the court held the plaintiff could sue a co-worker for assault, battery and false imprisonment, even though the co-worker also had engaged in sexually harassing conduct. However, the court was careful to distinguish the issue before it from the issue here, i.e., whether the plaintiff could have sued the employer for negligent retention under the same circumstances. That question had been answered – negatively – in an earlier case, Geise v Phoenix Co of Chicago Inc, 159 Ill2d 507; 639 NE2d 1273 (1994). Explaining the reason for the distinction, the court opined:

> In Geise, the plaintiff alleged that her employer negligently hired and retained a manager who sexually harassed the plaintiff. [159 Ill2d at 511-12]. This court observed that, but for the Act's proscription against sexual harassment, the plaintiff would have had no legally cognizable claim against her employer. [Id at 517]. Although the plaintiff in Geise dressed her claims as "negligent hiring" and "negligent retention," the allegations of negligence on the part of the employer were premised on the allegation that the employer hired and retained a manager who engaged in sexual harassment. [Id at 518]. Absent the Act's prohibition of sexual harassment, the employer's hiring and retention of an employee whose conduct created a hostile work environment would not have been an actionable tort. That is to say, in Geise the Act furnished the legal duty that the defendant was alleged to have breached.

Maksimovic, 177 Ill2d at 516-517. Because Elliott-Larsen "furnished the legal duty" Plaintiff alleges Ford breached, her remedy is solely under that statute.

Plaintiff's real quarrel is that remedial action by AVI, her employer -- had she

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case involved a common law claim against the government employer, Brock v United States, 64 F3d 1421 (CA 9, 1995). Brock involved extreme conduct, including rape, between a supervisor and his subordinate (the plaintiff) while on the job together. Other circuits have rejected Brock, as should this Court. Mathis v Henderson, 243 F3d 446, 450-451 (CA 8, 2001); Pfau v Reed, 125 F3d 927, 933 n2 (CA 5, 1997), on remand, 167 F3d 228, 229 (CA 5, 1999).

sustained her burden of providing notice -- would have been a "paltry remedy." (Plaintiff's Response Brief at 26). Stated otherwise, Plaintiff disagrees with legislative policy underlying Elliott-Larsen, repeatedly followed by this Court, that liability for hostile environment sexual harassment arises under *respondeat superior* principles. According to Plaintiff, she should not have to complain and she should not have to permit an opportunity to investigate and remedy. Rather, she should be allowed to proceed directly to Court, because the remedy currently provided by the law is too "paltry."

Respectfully submitted,

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APPENDIX TO:

REPLY BRIEF ON APPEAL - APPELLANT FORD MOTOR COMPANY

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A. Well, wait a minute. I'm pretty sure, because I think it was after that when she went on days. I don't think she was on days before that.

Q. Okay. So were there generally two cashiers on the shift?

A. Depending on the cafeteria, you know, that varies. The Cafeteria 1, usually there were two cashiers. Cafeteria 2, at first there were, like, two cashiers for the first break, and then they would send her home, and then there would just be the one, but that ended probably in August of '98, because the girl that was working the second cashier job was going to school, and she left for school and they never replaced her.

Q. Well, I must have misunderstood. I thought you said that Debbie Ellinger was a cashier on your shift at the time of the events that you allege.

A. Yes, the same shift. She was in Cafeteria 1, as far as I can remember. I know afterwards they did a cashier rotation and they switched the two of us. So then she was down in Cafeteria 2 and they had put me in Cafeteria 1.

Q. Okay. What was Faith Marquis' job?

A. She was a general, general utility.

Q. And did she work in Cafeteria 2 with you?

A. No, she worked in Cafeteria 1.
Q. Were there any general utility people who worked in Cafeteria 2 with you?
A. No.
Q. Were there any cooks that worked in Cafeteria 2 with you?
A. Yes.
Q. And how many?
A. There was one.
Q. Were there any cafeteria control clerks who worked in Cafeteria 2 with you?
A. Control clerks?
Q. Right.
A. I have not heard the word, control clerk, so I would say no.
Q. Well, were there any storeroom persons who worked in the Cafeteria 2 with you?
A. No.
Q. Do you know someone by the name of Paris?
A. Tim Paris, yes.
Q. What was his job?
A. He was a first cook.
Q. Who was the cook who worked with you in Cafeteria 2 in late fall, 1998?
A. I'm not sure. I think it was Kevin Mahon.

Exhibit 1 (Plaintiff's deposition excerpt 11/29/01) to Defendants' Joint Motion for Summary Disposition and Brief in Support

Q. And where did they wash pots?
A. In Cafeteria 1.
Q. Did it have a place to wash pots in Cafeteria 2?
A. Yeah, but there was such a large amount of pots from, you know, preparing the -- from the first cooks preparing large amounts of food, those pots needed to be washed in Cafeteria 1, which is where they were dirtied.

Down in Cafeteria 2, for instance, they had like a couple of pans from burgers, or, you know, a couple of pans from french fries. It was -- you know, it didn't take very long to do those, but the cook did do those before he left.

Q. And so he did those in Cafeteria 2?
A. Uh-huh.
Q. And then he went to get whatever he needed to restock whatever food he needed for the next break?
A. Yeah. Like, if we were out of soup or something, you know, he would go down there and have them send it down. But I know he had gone down to wash pots, given that it was Kevin, I'm pretty sure. I know he used to go down and wash pots in between, from one break to the next. And then before he had prepared his food again for the next break, french fries, you know, sandwiches, grilled items, whatever, he would

come back down with time to do that before we opened again.

Q. I'm sorry, you said that this was Kevin?

A. Yeah. In Cafeteria 2, I'm pretty sure that that's who was there.

Q. When?

A. When the issue with Bennett occurred. But that is something that he used to do. I'm assuming we were short of people, which is why he was going down and doing all that.

Q. And what is Kevin's last name?

A. Mahon, M-a-h-o-n.

Q. So when you worked in Cafeteria 2, it was staffed by you and the second cook?

A. Yes.

Q. Do you know someone named Stanley, whose last name is Stanley?

A. Sue Stanley. I know a Sue Stanley.

Q. What was her job?

A. I have no clue. I knew who she was. I had heard her name. She worked for Ford Food Service, and I think briefly for AVI, and then she didn't work there anymore, but it wasn't -- I really didn't get to know her or know her.

Q. How many general utility employees worked on a